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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED]
EAC 02 220 50429

Office: VERMONT SERVICE CENTER

Date: DEC 22 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States. As discussed below, the record contains a serious procedural error and the director erred in concluding that the lack of a job offer precludes eligibility for a waiver of that requirement.

On appeal, counsel notes that he represents the petitioner for the petition, but that the petitioner filed a Form I-485 Application to Register Permanent Residence or Adjust Status pro se. On December 2, 2002, the director issued a request for additional evidence (RFE). The director indicated that the request related to the Form I-485 and did not send a copy to counsel, however, the content of the request clearly relates to the Form I-140 petition. In response, the petitioner noted that she had filed the instant petition and referred the director to the evidence that accompanied the petition. On appeal, counsel correctly notes that the director erred. The information requested in the RFE clearly relates to the petition, not the Form I-485. Thus, the director mislabeled the RFE and erred by failing to send it to counsel.

Normally, the appropriate remedy for the director's failure to issue a proper RFE is to consider any evidence that would have been submitted in response to a correctly issued RFE on appeal. For the reasons discussed below, however, we find that director's final decision contains errors of law. Thus, we cannot uphold the decision on appeal.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in mechanical engineering from the New Jersey Institute of Technology. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional. "] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The director concluded that "the importance of particle technology is not immediately apparent." In addition, the director concluded that the lack of a "job offer" precluded the petitioner from establishing that the proposed benefits of her work would be national in scope. Finally, the director failed to consider the petitioner's research history in considering whether the petitioner will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. Rather, the director stated:

No persuasive evidence was presented which would establish that denial of a national interest waiver would adversely affect the national interest. Since the petitioner has no actual job offer,

the denial of this waiver will not be depriving a petitioner of the services of a specially qualified employee.

First, we will address the flaws in the director's focus on a "job offer." Then we will expand on the appropriate considerations for the waiver sought by the petitioner.

As used in the pertinent statute and regulations, the term "job offer" refers to a labor certification from the Department of Labor.¹ The national interest waiver is a waiver of the requirement for certification from the Department of Labor. Thus, the director cannot deny the waiver request for a failure to submit Department of Labor certification. To hold otherwise would be to negate the entire concept of a "waiver." Thus, we must assume that the director is not using the term as used in the statute and regulations but as it is used commonly. While the petitioner does not appear to have a permanent job offer, she is working in her field as a postdoctoral researcher. Thus, it is not even apparent that the director's objection is factually correct. Regardless, counsel is correct that no type of job offer is required for the waiver sought by the petitioner.

We do not hold that the petitioner's ability to work in the field is never an appropriate consideration. For example, a lengthy absence from a rapidly advancing field might suggest that an alien does not have the type of experience necessary to benefit the national interest in that field. As stated above, however, the petitioner was working as a postdoctoral researcher in her field at the time of filing. Thus, in this case, the basis of the director's decision is not supported by the statute, regulations or facts.

Finally, the director's statement that the lack of a job offer precludes eligibility because "denial of this waiver will not be depriving a petitioner of the services of a specially qualified employee," implies that no self-petitioner could ever qualify for a waiver. The regulation at 8 C.F.R. § 204.5(k)(1), however, provides that an alien seeking the waiver may file a petition in her own behalf. Moreover, assuming an employer had petitioned for the petitioner, an employer's desire for an employee with unique qualifications is not the primary consideration for the waiver. Special or unusual knowledge or training does not inherently meet the national interest threshold. *Id.* at 221. In light of the above, we remand the matter for a determination based on the following considerations.

The first two elements (the intrinsic merit of the petitioner's field and whether the proposed benefits will be national in scope) relate to the petitioner's field and the goals she claims she will meet. They do not relate to the petitioner's personal history. According to the director, "the five letters which were provided did not contain any information which establish[es] the national interest of the United States in this field." We remand this matter in part for consideration of the reference letters explaining that the electronics and pharmaceutical industries, among others, rely on particle technology and the development of coatings. Dr. [REDACTED] the petitioner's advisor at the New Jersey Institute of Technology, explains that engineered particulates with tailored surface properties have applications in the pharmaceutical, food, cosmetic, ceramic, electronics and specialty chemicals industries. Further, [REDACTED] a research fellow at Merck Research Laboratories in New Jersey, further provides specific benefits of coatings in the pharmaceutical industry. The director should not dismiss explanations about the importance of the field simply based on the reference's association with the petitioner. While letters from independent experts are more persuasive evidence of an alien's influence in the field, it is inappropriate to dismiss a colleague's discussion of the merits of an alien's field based solely on the colleague's association with the alien.

¹ Section 203(b)(2)(B) of the Act; 8 C.F.R. § 204.5(k)(4)(ii).

We also remand this matter in part for consideration of the claims that the petitioner's models provide the potential to reduce the time and cost of testing and producing environmentally friendly coatings. In determining whether the petitioner has established that the efficient development of environmentally friendly coatings would be national in scope, the director should only take into account the *proposed* benefits of the petitioner's work. The petitioner's actual research history should not be considered until analyzing the next and final element.

Finally, as stated above, the director's sole consideration in analyzing the final element was the alleged lack of a "job offer." For the reasons discussed above, this analysis is incomplete and inconsistent with the benefit sought.

An appropriate analysis of this final element looks at whether the evidence goes beyond a showing of the importance of the petitioner's field and the potential for national benefits. Specifically, eligibility for the waiver must ultimately rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

Therefore, this matter will also be remanded for consideration of whether the petitioner has demonstrated a track record of success with some degree of influence on the field. *Id.* In his determination on this issue, the director should consider whether any of the petitioner's references provide examples of industry engineers relying on the petitioner's models and whether the petitioner has provided other evidence of independent researchers relying on her work, such as frequent citation of her publications. The director should send counsel notice of any future requests for additional evidence relating to the petition.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.